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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 188.

THE UNITED STATES, PETITIONER,

VS.

COWDEN MANUFACTURING COMPANY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

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Of Counsel:

MORELOCK & LAMB,
Washington, D. C.

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OPINION BELOW.

The opinion of the Court of Claims (R. 5) is reported in 33 F. Supp. 141.

JURISDICTION.

The judgment of the Court of Claims was entered April 1, 1940 (R. 11). The petition for writ of certiorari was filed June 27, 1940 (R. 12), and was granted October 14, 1940. Jurisdiction is conferred upon this court by Section 3(b) of the Act of February 13, ~~1935~~ 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED.

Respondent on June 24, 1933, contracted to sell to the United States mechanics' suits at a certain price. The contract contained a clause providing for an addition to the purchase price of any federal taxes imposed after the date of the contract and "made applicable directly upon the production, manufacture or sale of the supplies covered by this contract and are paid by the contractor on the articles or supplies herein contracted for."

On August 1, 1933, processing taxes were imposed upon the materials used by the respondent in manufacturing the suits. These taxes were billed to the respondent by the processors as a separate item and under an agreement with the processors the respondent was compelled to pay the processing taxes. The processors in turn paid the processing taxes to the Collector of Internal Revenue.

Is the respondent entitled, under the provisions of its contract, to recover from the United States the processing taxes imposed subsequent to the date of the contract directly upon the manufacture of the materials used which respondent was compelled to pay to the processors?

STATEMENT.

Respondent is a Missouri corporation with offices at 412 West 8th Street, Kansas City, Missouri (R. 5).

On June 24, 1933, pursuant to a bid submitted on June 6, 1933, it entered into a contract, No. W-699-qm-4800 (O. I. 2538), with the United States through the proper purchasing officers of the Quartermaster Corps at Philadelphia, Pennsylvania, in which respondent agreed to sell to the United States and deliver at the Quartermaster Depot at Philadelphia, Pennsylvania, 23,496 suits, mechanics type B-1, at $1.90 for which the United States agreed to pay $44,642.40 (R. 6). In accordance with a change order dated July 5, 1933, under Article 7 of the contract, the total was increased upon written order from the proper contracting officer of the War Department and respondent was required to and did furnish 11,724 additional suits, mechanics type B-1 at $1.90 for which the United States agreed to pay $22,275.60 (R. 6). All suits, totalling 35,220, were delivered by the respondent, accepted and approved by the United States, and $66,918 paid by the United States to the respondent as provided by the contract (R. 6).

Both the bid made June 6, 1933, and the contract of June 24, 1933, contained the following provision:

> "Prices set forth herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based, and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased

accordingly and any amount due the contractor as a result of such change, will be charged to the Government and entered on vouchers (or invoices) as separate items" (R. 6).

Respondent, in the manufacture of the suits, used 213,127 3/4 yards of cotton cloth purchased from McCampbell and Company, 320 Broadway, New York, selling agents for the Graniteville Manufacturing Company of South Carolina, a first domestic processor. Also respondent used 885 2/5 units of cotton thread purchased from the American Thread Company. The confirmation of respondent's orders for said cotton cloth by McCampbell and Company contained the following provision (R. 6-7):

> "The prices stated herein are based upon present manufacturing conditions and cost thereunder. If such cost is increased by any federal taxes or by the administration of the Industrial Recovery Act, the Agricultural Adjustment Act or by any federal regulations or federally approved codes and practices, affecting costs, not now in force, the amount of such increased cost shall be added to the prices stated and delivery shall be extended in proportion to any limitation of production caused thereby."

The confirmation by the American Thread Company for respondent's order for cotton thread dated June 24, 1933, contained the following provision (R. 7):

> "In addition to the prices upon which this contract of sale is based, buyer agrees to pay any additional costs resulting from any sales tax or taxes and/or domestic allotment charges that may be imposed by the federal, state and/or local government and applicable to any items on this contract at time of shipment.'

Pursuant to the provisions in the confirmations, McCampbell and Company billed the respondent as a separate item for processing tax in the amount of $4,425.54 and the American Thread Company billed the respondent as a separate item for processing taxes in the amount of

$44.44. These taxes were paid by the respondent to the processors and in turn by them paid to the Collector of Internal Revenue (R. 7).

Respondent duly made claim and demand against the United States with the War Department for an increase in its contract price of $4,469.98 which was the processing tax imposed upon the processing of the cotton used in the manufacture of the cloth purchased and used by the respondent in the manufacture of the mechanics' suits furnished by the respondent to the United States (R. 7-8).

Thereafter, the claim was referred to the Comptroller General of the United States and was denied and rejected by the Comptroller General in his decision dated August 11, 1936, A-68085 (R. 8).

The Secretary of Agriculture, pursuant to the authority vested in him by the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended, prescribed that the first marketing year for cotton began August 1, 1933. The tax was fixed at 4.2 cents per pound beginning August 1, 1933. The processing taxes of $4,469.98 were assessed and paid subsequent to the date of the contracts entered into between the respondent and the War Department and subsequent to the agreements between the respondent and the processors (R. 8).

This suit was filed December 1, 1938, in the Court of Claims of the United States (R. 1), which rendered an opinion in favor of (R. 5) and entered judgment for the respondent in the amount of $4,469.98 on April 1, 1940 (R. 11).

SUMMARY OF ARGUMENT.

The controversy herein arose and developed as the consequence of the Government refusing to reimburse the respondent under the provisions of a contract for processing taxes on materials used by the respondent in supplies furnished under the contract, paid by the respondent to the processors.

The question does not involve the claim of a taxpayer for the recovery of a tax erroneously and illegally collected. The right of the respondent to recover depends upon the provisions of its contract with the Government.

The processing taxes paid by the respondent to its vendors were "applicable directly" upon the manufacture of the supplies and falls squarely within the provisions of the contract. Any other interpretation would produce unreasonable and unwarranted results.

The authorities cited by the Government as supporting its position have no direct bearing upon the interpretation of respondent's contract with the Government, but if there is an inference to be drawn from these decisions it is favorable to the respondent.

The Court of Claims has decided the identical issue here involved in favor of the plaintiffs in four cases and in so far as we know there is no conflict.

ARGUMENT.

I.

The origin and development of the controversy.

The Agricultural Adjustment Act (48 Stat. 31) was approved May 12, 1933.

In enacting this legislation it was the purpose of Congress as set forth in Section 2(1) of the Act:

> "To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will re-establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the base period."

In order to carry out the purpose as indicated the Secretary of Agriculture was given the authority by Section 8 of the Act to provide among other things for the reduction of acreage employed in the production of any basic agricultural commodity and

> "to provide for rental or benefit payments in connection therewith * * * in such amounts as the Secretary deems fair and reasonable."

Section 9(a) of the Act provided:

> "When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * * The rate of tax shall conform to the requirements of Subsection (b)."

In Subsection (b) it is provided:

> "The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; * * *."

However, if the Secretary of Agriculture concluded that the tax at such rate resulted in the accumulation of surplus stocks or a depression of the price of the commodity, then, and in that event, it is provided:

> "the processing tax shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity."

It was generally known in the spring of 1933 both before and after the enactment by Congress of the foregoing legislation that any concern which contracted with the Government to furnish materials and supplies processed from basic commodities would have to take into consideration the material effect of certain then unknown levies of taxes. In order that the Government might continue to purchase its supplies and the business concern might continue to sell these supplies to the Government where they were manufactured by the processing of basic commodities it was necessary to eliminate the uncertain factor of the tax until it was definitely determined and because effective with respect to the individual bids and contracts. In recognition of this situation the various purchasing agencies of the Government devised and incorporated in the bid and contract forms the "tax clause" of which the wording used in the bid and contract between the Government and the respondent in the instant case is typical providing as follows:

> "Prices set forth herein include any federal tax, heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening the bid upon which this contract is based and made applicable

directly upon the production, manufacture, or sale of the supplies covered by this contract and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

The respondent submitted its bid on June 6, 1933, and the contract was awarded June 24, 1933. The above clause was contained in both the bid and contract (R. 6). In executing the contract both parties no doubt understood that no tax had at the date of the contract been imposed upon the materials to be used but on the other hand the parties were aware that such a tax might be imposed upon the materials to be used and it was the mutual agreement that in the event the contractor was forced to increase its costs by such tax then the contract price would be accordingly increased. The Secretary of Agriculture exercised the authority conferred upon him by Congress on July 14, 1933 (R. 11), and thereby fixed the rate of the tax and designated August 1, 1933, as the beginning of the marketing year with respect to cotton.

That the Government never intended that the tax be added to the bid and/or contract price by the respondent at the time same were consummated is amply illustrated by the correspondence between the parties in the case of *The Telescope Folding Furniture Company, Inc.*, v. *The United States*, 31 F. Supp. 780, 90 Ct. Cls. 635. There the bids for the supplies were submitted July 28, 1933, which was subsequent to the proclamation of the Secretary of Agriculture July 14, 1933, and prior to the effective date, August 1, 1933. Upon inquiry by the contractor as to whether or not the tax should be included in the bid the policy of the Government was clearly stated as follows:

"(a) If a federal processing tax is in *effect* at the time bids are opened, it will be presumed that

the successful bidder included the tax in his bid and no amount in excess of that bid will be paid by the Government.

"(b) If a federal processing tax becomes *effective* after bids are opened or after the contract is made, which tax must be paid by the vendor, the bid price may be increased accordingly in the manner stated in the 'Federal Taxes' paragraph in the invitations to bid, first above referred to.".

The respondent purchased the cotton cloth use in the manufacture of the supplies from McCampbell and Company, agents for the Graniteville Manufacturing Company, the first domestic processor and the cotton thread used from the American Thread Company, a first domestic processor. The respondent agreed to pay to its vendors any processing taxes which might be imposed upon the processing of the materials. The materials were furnished to the respondent and the invoices listed in addition to the agreed price for the materials and as a separate item processing taxes of $4,469.98 which were duly paid to the processors by the respondent. In turn the processors paid these taxes to the Collector of Internal Revenue.

Thus in accordance with the express provisions of the contract and the mutual understanding of the parties, respondent is entitled to recover from the Government the processing taxes paid on the materials.

II.

The respondent is not seeking as a taxpayer to recover taxes erroneously and illegally assessed and collected, but seeks to recover under a contract the taxes which it in turn was compelled under contract to pay to its vendors, thus increasing the cost of materials used in the furnishing of supplies provided under its contract with the Government.

The first case involving construction of the "tax clause" under analogous circumstances was that of the

Batavia Mills, Inc., v. *United States*, 85 Ct. Cls. 447. There the plaintiff purchased cotton shirting from the processor and paid to the processor the processing taxes. The Court of Claims rendered judgment in favor of the plaintiff for the amount of processing taxes paid by it to the processors. It was the contention of the Government that the plaintiff should not be permitted to recover because it did not actually pay the processing taxes to the Government. The court in rendering judgment for plaintiff said:

> "The ruling made by the Comptroller General cannot be sustained. This is not a suit for the refund of taxes paid but an action based upon the provisions of a contract. The provisions of law with reference to refunds of taxes collected under the Agricultural Adjustment Act have therefore no application. All the matters necessary to establish plaintiff's claim under the contract are shown. After the contract was entered into a new and additional tax was imposed on the manufacturer from whom the contract supplies were purchased by plaintiff. The tax was passed on by the manufacturer and under the terms of plaintiff's contract with the manufacturer it was obliged to pay it. Defendant expressly agreed that the amount of the tax should be added to the purchase price. The right of the plaintiff to recover the amount so paid is clear and judgment will be rendered accordingly."

In the case of *Righter* v. *United States*, 85 Ct. Cls. 699, the court rendered judgment in favor of the plaintiff on the same basis although in that case the plaintiff paid the processing taxes to his vendor which in turn paid it to the manufacturer of the supplies which in turn paid it to the first domestic processor. In the instant case and that of The Telescope Folding Furniture Company, *supra*, it has not abandoned its contention that recovery should not be had because the plaintiff did not pay the processing taxes to the Government, other points have been stressed in support of its position by the Government.

The plaintiff did not and is not entitled to file a claim for the recovery of the taxes as such and would only

have such right as a first domestic processor. After the Agricultural Adjustment Act was declared unconstitutional by this court on January 6, 1936 (*United States* v. *Butler*, 297 U. S. 1), Congress enacted Title VII of the Revenue Act of 1936, wherein it was provided that processors could file a claim with the Collector of Internal Revenue for recovery of the taxes which had been held to be unconstitutional and upon a showing that they had absorbed the taxes could recover. This respondent has no right to file such a claim under the provisions of Title VII of the Revenue Act of 1936, not having been the first domestic processor. Neither have respondent's vendors a right to recover under the provisions of Title VII of the Revenue Act of 1936, because it definitely passed on the taxes. The Government is not only in the position of having refused to abide by the terms of the contract, but has been unjustly enriched by the retention in its possession of unconstitutional taxes which, although absorbed by respondent, are not available to it except under the express provisions of the contract.

Even though the Government defended the *Batavia Mills Case* and the *Righter Case, supra*, before the Court of Claims on the ground that the plaintiff did not pay the taxes to the Government, yet the realization seemed to be prevalent that plaintiff should recover because in its briefs in these cases the Government said:

> "On the other hand, in a situation where the burden of the tax is passed on to the contractor from the 'processor' as here, the spirit, if not the letter, of the contract may require the reimbursement to the contractor of any amount equivalent to the processing tax here involved. Of course, under this interpretation of the contract, the burden is on the contractor to establish, as has been done in this case, that—
>
> (1) The 'processor' paid the processing and/or floor stock tax imposed by the Agricultural Adjust-

ment Act on the cotton from which the supplies involved here were manufactured, and

(2) The contractor in turn bore the burden of said tax, by reason of the actual increased cost to it and the payment of that additional amount for the supplies which it had agreed to deliver to the defendant."

The conditions as prescribed by the Government prevail in the instant case in that the processor passed the taxes on to the respondent and respondent's costs were increased thereby and furthermore the processor paid the taxes to the Government. As heretofore indicated it is respondent's contention that it should be reimbursed on account of the specific provisions of the contract in as much as the taxes were imposed and became effective after the contract to furnish the supplies had been executed. The fact that the taxes were invoiced to the respondent as a separate item and were so collected from the respondent merely serves to identify the liability of the Government under the express provisions of its contract.

The Government in defending the instant case before the Court of Claims endeavored to distinguish it from the Batavia Mills and Righter cases on the grounds that the contracts in those cases had been negotiated prior to, while the contract in respondent's case had been entered into subsequent to, the enactment of the Agricultural Adjustment Act May 12, 1933. The Government took the position that since the Agricultural Adjustment Act had been approved prior to respondent's contract it was on notice that the taxes should have been included in the bid and hence whether or not the tax were included in the bid, as a matter of fact, nevertheless technically the respondent was not entitled to recover. As heretofore indicated the Court of Claims had previously disposed of this question in its opinion in The Telescope Folding Furniture Company case wherein it had been definitely set out in correspondence between the plaintiff and the

Government with respect to bids made on July 28, 1933, subsequent to the proclamation of the Secretary of Agriculture July 14, 1933, fixing the rate of the tax and designating the first marketing year as August 1, 1933, that the tax should not be included in the bid unless and until the tax became effective. The Court of Claims considered very carefully the contention of the Government and shows that it was unknown when respondent's contract was negotiated whether or not there would be a processing tax on cotton; it was unknown when such a tax would become effective; the rate of any possible tax could not be determined; any rate which might be fixed was not assured of application because the Secretary of Agriculture might change it prior to its effective date and even after the rate became effective it might be altered by the Secretary of Agriculture. A more unstable and uncertain state of affairs could not have been created and as indicated by the court neither the respondent nor its vendors could have determined the tax, if any, that it would be necessary to pay and consequently to include such tax in the bid price, even if it had not been the policy of the Government to require that any tax should be omitted from the bid. The Court of Claims concludes (R. 11):

> "Under such circumstances we cannot say that these taxes had been 'imposed' prior to the date of plaintiff's contract with the defendant within the meaning in which that word was used in the contract. Authority had been conferred by Congress for the imposition of the tax, but that authority had not been exercised until thereafter, to-wit, on July 14, 1933. The purpose of the federal taxes provision of the contract was to reimburse the contractor for its additional costs brought about by the defendant's act in levying additional taxes. The taxes were not in effect when the contract was made and it was impossible for the contractor to ascertain when they would go into effect or the amount of them when they did. Therefore, it could not figure what to include in its costs on account of them. We are, therefore, of opinion that the processing taxes paid by the plaintiff

were taxes 'imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based.' The action of Congress in imposing the tax was not complete until action by its delegate, the Secretary of Agriculture, and this was after the contract was made" (R. 11).

III.

The processing taxes paid by the respondent to its vendors were "applicable directly" upon the manufacture of the supplies and fall squarely within the provisions of the contract. Any other interpretation would produce unreasonable and unwarranted results.

The respondent purchased the cotton cloth used in making the mechanics' suits from the manufacturer or processors through its agent, McCampbell and Company, and purchased the cotton thread from the manufacturer or processor, The American Thread Company. These vendors in accordance with their agreement with the respondent invoiced the processing taxes of $4,469.98 to the respondent as a separate item and the same were paid by the respondent in addition to the cost of the materials. The Government now contends in its brief (pages 8 and 9) that:

> "In the instant case the taxes certainly were not imposed upon the mechanics' suits."

At the same time the Government admits that

> "They (the taxes) were imposed upon the processors of the raw materials that were purchased and employed by the contractor in producing its final product for sale to the Government."

It is difficult to see why the fact that the respondent cut the cloth into shapes and sewed it together using the thread, a mere change in form and not substance, would serve to alter the responsibility of the respondent to its vendors or the responsibility of the Government to the respondent under the express provisions of the contract.

This same contention was advanced by the Government before the Court of Claims in the case of The Telescope Folding Furniture Company, *supra*, and was carefully considered by the court. The plaintiff in that case furnished cots to the Government, in the assembling of which it had used supplies processed from cotton purchased from a number of cotton processors. The court said:

> "The defendant makes no point of the fact that the contract was executed after the processing taxes on cotton had become effective, in view of the terms of the notice to bidders issued by the contracting officer. It, however, defends upon the ground that no processing tax was levied on cots, and that the so-called 'Federal Taxes' provision of the contract applies only to the articles furnished thereunder and not to the component parts thereof.
>
> Whether or not the defendant may be technically correct in this position, it is manifest that the plaintiff and the defendant's representative understood that there was not to be included in its bid any amount on account of processing taxes on any of the material used in making the cots, but that such taxes would be added to the contract price under the 'Federal Taxes' clause of the contract."

The court then considers the surrounding circumstances and conditions prevailing when the bids and contract were made which, as has heretofore been shown, prevail generally in all of these cases and then concludes:

> "In equity and good conscience, therefore, the plaintiff should recover the amount of the processing taxes paid by it, and the contract must be so construed by us, unless to do so would do violence to its plain and unequivocal meaning. We think it is susceptible of this construction."

The court then analyzes the tax clause in the contract as relating to defendant's contention:

> "The first sentence of the 'Federal Taxes' provision states that the prices set forth in the contract

do not include any federal taxes 'applicable to the material purchased' thereunder. The next sentence provides that if certain taxes are thereafter levied by Congress and made applicable to 'the production, manufacture or sale *of the supplies* covered by this contract, and are paid by the contractor, *on the articles or supplies herein contracted for*' such taxes are to be paid the contractor by the defendant (italics supplied by the court). While strictly speaking the 'material purchased' and the 'articles or supplies' were the cots, they include the cot's framework, the canvass covering and strap, and all its component parts.

If the plaintiff had contracted to furnish unassembled the framework for the cots and the canvass coverings and the strap, there could be no doubt that it would be entitled to recover for the processing tax paid on the covering and strap. The fact that it tacked the canvass covering and the strap to the framework and furnished the cot as an assembled article, we think, makes no difference.

The contractor did not pay the tax on the cots, but it did pay it on a part of the cots, namely, the canvass and strap. The payment of the tax on a part of the article was a payment of tax on the article itself."

As stated by the Government in the concluding paragraph of its brief (page 10) to which we subscribe:

> "The preference in the construction of contracts for an interpretation avoiding unreasonable or impossible results is well established. See Williston, Contracts (Rev. Ed., 1936), 1786 ff."

At the time before, when the contract was consummated, and subsequently there was never contemplated a tax on mechanics' suits, as such, in so far as any record shows. The tax was imposed upon the materials contained in such suits processed from basic commodities so designated by the Secretary of Agriculture under authority conferred upon him by the Congress under the provisions of the Agricultural Adjustment Act. To assume

that the parties had in mind, when the contract was made, anything other than the processing tax on the materials used in furnishing the supplies seems to be without foundation and an "unreasonable interpretation" which would produce unwarranted results. Such an interpretation increases respondent's costs of materials by the amount of the processing tax paid to its vendors under contract, and, in turn, permits the United States to profit by failure to comply with the specific provisions of a contract which the facts and circumstances clearly show were mutually understood between the parties to mean that respondent should recover such additional costs.

The Government on pages 9 and 10 of its brief maintains that the use of the word "directly" and the general character of the tax provisions indicate that reimbursement was not contemplated by the parties. It is also urged that any other construction of the contract than that urged by the Government would introduce the question of shifting of taxes and that the parties might have contracted on a cost plus basis or included an "equitable adjustment" clause.

It appears clear that the parties in using the word "directly" had in mind the addition to respondent's cost of materials of the tax subsequently imposed. It is true that other methods of expression or other bases of contact might have been used, but they were not, and the simple direct wording of the contract entered into was in all regards sufficient. In the case of *Cramp & Sons Ship and Engine Building Co.* v. *United States*, 72 Ct. Cls. 146, the court decided that the capital stock tax paid by the plaintiff for the year in which it was constructing a vessel under a cost plus contract represented a part of the cost prior to the computation of the percentage of profit. It would appear that if at all in point the decision of the court in that case would strengthen the position of the respondent here.

It is respectfully submitted that there is no question of the "shifting of taxes" or the "tracing of taxes" involved here. The court below has found as a fact that respondent paid the taxes to the processors and in turn the processor paid the taxes to the collector (R. 7).

IV.

The authorities cited by the Government as supporting its position have no direct bearing upon the interpretation of respondent's contract with the Government, but if there is an inference to be drawn from these decisions it is favorable to the respondent.

The Oswald Jaeger Baking Company v. *Commissioner*, 108 F. 2d 375 (C. C. A. 7, cert. denied), 309 U. S. 683; *Fuhrman & Forster Co.* v. *Commissioner*, (C. C. A. 7) p. 9600 Commerce Clearing House Tax Service, 1940 (not yet reported); *Zinsmaster Baking Co.* v. *Commissioner*, 109 F. 2d 738 (C. C. A. 8); *New Consumers Bread Company* v. *Commissioner*, (C. C. A. 3) p. 9633 Commerce Clearing House Tax Service, 1940 (not yet reported), are all cases wherein the United States Circuit Courts of Appeal reviewed the decisions of the United States Processing Tax Board of Review created by the Revenue Act of 1936 for the purpose of reviewing claims for refund of processing and/or floor stock taxes filed by the taxpayers with the Collector of Internal Revenue under the provisions of Title VII of the Revenue Act of 1936, after such claims had been rejected by the Commissioner of Internal Revenue.

These cases would not have arisen except for the fact that the Agricultural Adjustment Act was declared unconstitutional and involved the question of whether or not the litigants were entitled to a refund of taxes under the provisions of Title VII of the Revenue Act of 1936. Respondent's suit to recover the processing taxes paid its vendors has no basis under Title VII of the Revenue Act of 1936. On the other hand, respondent's claim arises

under the specific provisions of the contract and was affected in no way on account of the unconstitutionality of the Agricultural Adjustment Act.

The Government also cites the cases of *Lash's Products Company* v. *United States*, 278 U. S. 175, and *United States* v. *Glenn L. Martin Company*, 308 U. S. 62, which the Court of Claims in rendering judgment for the plaintiff in the case of *The Telescope Folding Furniture Company* v. *United States*, *supra*, considered with respect to the identical point raised by the Government in the case at bar and concluded that these cases are not in point. The court said:

> "The Lash's Products Company case did not involve the proper construction of a contract, which is the question of whether social security taxes came sented in the Martin case. That case involved only the question of whether Social Security taxes came within the 'Federal Taxes' provision."

It is our contention that the decision of this court in the Glenn L. Martin case strengthens the position of the respondent here. The Martin company contracted with the War Department to furnish aircraft and aircraft materials. The provisions of the "Federal Taxes" clause were substantially identical with those in the case at bar. Subsequent to the date of the contract, the Social Security Act became effective and the State of Maryland enacted an unemployment compensation law. The Martin company paid the United States $794.03 federal social security taxes and to the State of Maryland $6,943.29 unemployment compensation taxes with respect to *pay rolls* of employees who were engaged in work on the contracts in 1936 and 1937. The Martin company sought to recover from the United States the social security taxes and the unemployment compensation taxes paid alleging that such recovery was proper under the contract. In denying the right of the Martin company to recover under its contract this court said:

"Thus, this contract was concerned with federal taxes 'on' the goods to be provided under it, whatever the occasion for the taxes. And a tax 'on' the relationship of employer-employee—characterized as a tax on pay rolls—is not of the type treated by the contract as a tax 'on' the goods or articles sold.

"The contract refers only to federal taxes, existing or future, on 'material,' 'articles' or 'supplies.' And additional compensation is provided to offset only federal taxes of the type of sales taxes and processing taxes, 'applicable directly upon production, manufacture, or sale' and actually paid on supplies delivered to the Government. Since a tax on pay rolls, or on the relationship of employment, is not—but in fact is distinct from—the type of tax 'on' articles represented by sales taxes and processing taxes, respondent is not entitled to the additional compensation which it seeks."

Respondent's contract specifically includes the processing taxes which were paid upon the processing of the *materials* which respondent cut and put together in the form of mechanics' suits.

The cases of *Liggett Myers Tobacco Co.* v. *United States*, 299 U. S. 383, and *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572, cited in a footnote at page 9 of the Government's brief involve the validity of tobacco and transportation taxes under the circumstances stated and do not appear to be in point here.

Conclusion.

The decision of the Court of Claims is correct and should be affirmed.

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